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IN THE

Supreme Court of the United States

October Term, 1957

No. 420

WILLIE C. SAWYER, ET AL.

CHARLES E. BURGESS, ET AL.

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Willie C. Sawyer, et al., pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered on the third day of April, 1957, in the above entitled cause (No.'s 209-55 and 219-56, below, consolidated for trial and decision).

OPINIONS BELOW

The opinion of the Court of Claims in the present case is printed in the Appendix hereto, at page 16, and is unreported. Also printed in the Appendix (p. 18) is the opinion of the Court of Claims in *Gaetke* v. *United States.*

JURISDICTION

The judgment of the Court of Claims was entered on April 3, 1957. (R. 59). A motion for rehearing and for

modification of the findings and judgment was timely filed on April 11, 1957, (R. 61) and denied by the Court on June 5, 1957. (R. 65). The jurisdiction of this Court is invoked pursuant to Title 28, Section 1255, U.S.C.

QUESTIONS PRESENTED

Section 201 of the Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, provides that "Officers and employees to whom this title applies *shall*, in addition to their basic compensation, be compensated for *all hours of employment*, officially ordered or approved in excess of 40 hours in any administrative work week . . .". (Italics supplied). Section 301 of the same Act provides premium compensation for *duty* performed between the hours of 6 o'clock P.M. and 6 o'clock A.M. Petitioners have been employed as guard-firefighters at a Veterans Administration hospital and respondent agrees that these sections of the statute are applicable to them.

1. Under the provisions of the statute cited above, in the absence of any contract to the contrary, are petitioners entitled to pay for time in excess of 40 hours per week during which they were confined by official order to their posts on the hospital grounds, continuously subject to call for duty and in fact called when needed, but allowed to eat and, at irregular hours, to obtain some sleep which was inadequate in quality by reason of facilities and circumstances inconsistent with normal sleep?

2. Under the conditions outlined in Question 1 above, are petitioners entitled to night pay differential for time compulsorily spent on the respondent's premises?

3. The instant case having been tried solely on the issue of liability, apart from any issue of damages, was it error for the Court of Claims to dismiss the petition in its entirety upon findings establishing that, at the very least, *some* work was performed by petitioners during their so-called rest periods?

STATUTES INVOLVED *

The statute involved is the Federal Employees Pay Act of 1945, 59 Stat. 295, as amended which provides in pertinent part as follows:

> "Sec. 201. 'Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative workweek, at overtime rates as follows: * * *' (5 U.S.C. 911)
>
> "Sec. 301. 'Any officer or employee to whom this title applies who is assigned to a regularly scheduled tour of duty, any part of which including overtime, falls between the hours of 6 o'clock p.m. and 6 o'clock a.m., shall for duty between such hours . . . be paid compensation at the rate of 10 per centum in excess of his basic rate of compensation for duty between other hours . . .'" (5 U.S.C. 921)

STATEMENT OF THE CASE

For various periods since May 25, 1949, petitioners, in the classified service of the United States, have been employed by respondent in the combined capacity of guards

* Finding 8.b. (R. 36) sets forth a regulation of the Veterans Administration bearing date of August 26, 1949 setting forth a so-called 2/3 rule in terms applicable only to firemen. Subsection c.(3) thereof specifically exempts guards from the regulation governing fire protection personnel. Subsection 3(d) of the regulation states "where certain employees are engaged on continuous activities such as *guards*, the officials having authority to fix or change tours of duty may designate any two days in the administrative work week as no-work days, in lieu of Sunday and Saturday. However, the administrative work week shall coincide with the calendar week and include a basic work week of five 8-hour days during the calendar week . . ." Finding 14.a. specifically states "only a minor part of their (petitioners') weekly total of hours was spent in actually fighting fires or in training in fire fighting techniques". The Commissioner concluded that these regulations are inapplicable to petitioners. (R. 22-3). The Court presumably agreed, making no mention of them in its opinion.

and firefighters at the Oteen Veterans Hospital, a facility of the Veterans Administration, their duties as guards predominating over their duties as firefighters. (R. 40). Prior to 1947, the positions of guard and firefighter were separate ones at the Oteen Hospital. The consolidation of functions was carried out in the ensuing two years. It was accompanied by a reduction in force but not by a corresponding increase in pay to the individual whose duties were enlarged. (R. 34). During the entire period covered by this claim each of the petitioners, except when on leave status, had tours of duty totalling 60 hours each week, consisting of two 24-hour tours and one 12-hour tour, the former being from 8 A.M. to the following 8 A.M. and the latter from 8 P.M. to the following 8 A.M. (R. 53). Each daily tour of duty consisted of one part during which petitioners performed active, routine assignments, and of another part during which they were on a standby basis, remaining continuously subject to call and performing any of a wide variety of tasks when called. No definite hours were set aside as sleeping or eating time. The exigencies of the duties permitting, petitioners were free to lie down on their cots and have some sleep between 12-1 o'clock A.M. and 6-7 o'clock A.M., when on the 24-hour tour of duty, and between 8 o'clock P.M. and 11 o'clock P.M. when on the 12-hour tour of duty. (R. 54-6). Thus, petitioners had available a maximum of 6 hours for sleep during each of the two 24-hour tours of duty, and a maximum of 3 hours for sleep during each of the 12-hour tours of duty. Petitioners had available 7 meal periods during their weekly tours of duty, each meal lasting 20 to 30 minutes, or a maximum of 3½ hours per week. (R. 54). These, together with not more than 15 hours available each week for sleep, totalled 18½ hours, leaving a minimum of 41½ hours out of the 60-hour weekly tour of duty spent in the performance of routine assignments, or fully awake in an active standby basis.

In addition to the 1½ hours of active standby time, over and above the regular 40 hours of work per week, the findings recite that "plaintiffs were available for call during their meal periods but the evidence does not establish that interruptions were frequent", (R. 54) and "while resting plaintiffs were available for call in the event of fire or other emergency but the record indicates that the frequency of such interruptions was not significant". (R. 54-5).

Following a lengthy and detailed resume of the manifold activities of petitioners comprised within their official duties, the last two sentences of Finding 14.a. state: "If any of the foregoing emergencies arose while plaintiffs were enjoying their rest period, and the men on duty were inadequate to cope with the problem or unavailable, the plaintiffs were then required to interrupt their rest to discharge their duties. It is not believed that these interruptions were frequent, *but they occurred with sufficient frequency to make necessary the presence of plaintiffs to cope with them.*" (Italics supplied). (R. 57).

Finding 14.e. recites that petitioners' so-called rest period was further encroached by a "small measure" of doubling over. This practice took the form of the men on the long shift continuing active work after midnight if a man on the 12-hour shift was unable to report for duty, or for those on the short shift substituting for an absent member of the long shift crew during their rest period from 8 o'clock P.M. to midnight. Finding 16 states that "On rare occasions they (petitioners) would have to attend disciplinary board hearings to testify during off duty hours." (R. 58)

Finding 17 shows that "plaintiffs . . . received no overtime pay or compensatory time off *for performance of duty* or time compulsorily spent on the reservation in excess of 40 hours weekly". (Italics supplied). (R. 58).

The sleeping facilities at Oteen consisted of six cots in a dormitory on the second floor of the fire station. The bachelor officers at Oteen had quarters on the same floor of the fire station. There were some interferences with sound sleep such as the noises made by the telephone in the dormitory, infrequent emergency calls to official duties, repair and maintenance of vehicles in the fire house and garage below and arrival and departure of delivery trucks and workers as early at 4 A.M. (R. 54-55). The resulting rest was of a quality inferior to that which one would normally enjoy at home. At one of the branches of the Oteen Hospital the dormitory was on the ground floor of the fire station adjacent to the fire fighting equipment and vehicle garage; and during portions of 1949 and 1950 a two-way public address system was hooked up near the dormitory and the nurse or aide on duty in the detention ward of the hospital would use the system to call petitioners periodically from 6 P.M. to 6 A.M. to check on their availability. If the telephone system broke down, a light would go on and a bell would ring in the dormitory. (R. 56).

Petitioners were married and living with their families. Their duty schedules caused a departure from the routine of family life and social activities normal to them had their occupations involved more regular hours. While on duty they were permitted to receive telephone calls only through the engineer's office, and could make outgoing calls only from a pay telephone which, at one branch of the hospital, was *two hundred* yards from the fire station. (R. 58).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

In the companion cases of *Armour Company* v. *Wantock*, 323 U.S. 126 and *Skidmore* v. *Swift and Company*, 323 U.S. 134, this Court firmly repudiated the notion that, within the meaning of the Fair Labor Standards Act of 1938, employment is coterminous with actual work, labor or physical exertion. Thus, in the *Armour* case, at page 133, this Court stated: "Of course, an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a standby capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case."

While, petitioners' request notwithstanding, the Court below failed to make an express finding upon this crucial question of whether the additional 20 hours per week over and above the normal 40 hour administrative work week, was spent predominantly for the benefit of the respondent or for the petitioners, there can be no doubt, upon the basis of the findings in the record that these additional hours were spent by the petitioners upon the premises of the respondent predominantly, if not exclusively, for respondent's benefit. This inference follows, as a matter of compulsion from Findings 10.e. (R. 54-5), 15., 16. and 17. (R. 58-9), wherein it is found that petitioners', rest was of a quality inferior to that which one

would normally enjoy at home; that petitioners were restricted to the reservation during their tours of duty, subject to disciplinary action for unauthorized absences; that they could not leave their place of employment even at the expiration of their tours of duty until they were relieved; that petitioners were married men, and that their duty schedules affected them disadvantageously in their social and family relationships; and that petitioners received no pay or compensatory time off for performance of *duty* or time compulsorily spent on the reservation in excess of 40 hours weekly.

In *Skidmore* v. *Swift and Company*, 323 U.S. 134, as well as in the *Armour* case, *supra*, this Court recognized that standby time is compensable time, the sole exception being time spent by the employee for eating, sleeping, or other purposes of his own unrelated to the purpose of the employment. The rationale for this exception lies, as stated by this Court in the *Skidmore* case, page 139, in that ". . . these are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued *adequately* and *comfortably* in the required circumstances . . ." (Italics supplied). As pointed out heretofore (*supra*, p. 4), these petitioners spent not 40, but a minimum of 41½ hours each week in the performance of routine assignments, or on a standby basis, no matter how described. It is clear that under the *Armour* and *Skidmore* cases this excess of 1½ hours per week is compensable time. Furthermore, in view of the findings summarized in the Statement of Facts, *supra*, the conclusion is inescapable that the rest period of petitioners was invaded by the respondent for the purpose of demanding that they interrupt their rest or meal in the performance of emergency, or other duty. As indicated, the trial of this case was limited to the issue of liability, the question of damages, if any, having been specifically reserved, by stipulation, for subsequent

proceedings. It is this fact which accounts for the absence of specific findings upon this particular.* It is clear, however, that the aggregate of these interruptions cannot be dismissed as negligible, and the description of such interruptions as not significant in the findings is clearly unwarranted in view of the *specific facts* contained in the findings adverted to in the Statement of Facts, *supra*.

Finally, a perusal of pertinent findings indicates that such mealtime and rest periods as petitioners had were so unsatisfactory in character as to make it impossible to regard them as "private pursuits" of petitioners. Finding 10.d. (R. 54) recognizes that petitioners were available for call during their meal periods and, at least by indirection, recognizes *some* interference with this activity when it states that the evidence does not establish that interruptions were "frequent". Findings 10.e. (R. 54), 12. (R. 55) and 14.a. (R. 56) describe the institutional character of the sleeping quarters available to petitioners and recites that "there are some interferences with sound sleep, such as the noises made by the telephone in the dormitory, infrequent emergency calls to official duty, repairs and maintenance of vehicles in the fire house and garage below, and arrival and departure of delivery trucks and early workers as early as 4 A.M.; that the resulting rest was of a quality inferior to that which one would normally enjoy at home; that public address systems and the ringing of bells was a source of substantial interference with sound sleep, and that interruptions to sleep occurred "with sufficient frequency to make necessary the presence of plaintiffs (petitioners) to cope with them." (R. 57).

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* Petitioners petitioned the Court of Claims for a rehearing to accomplish this very purpose, but their petition was denied. (R. 65).

The test laid down by this Court in the *Skidmore* case, *supra*, that to justify the elimination of eating and sleeping time from the compensable standby time, it need be shown that these activities could be "pursued adequately and comfortably in the required circumstances" is plainly denied application by the Court below. cf. also *Bountiful Brick Company* v. *Giles*, 276 U.S. 154, 158; *Tennessee Coal, Iron and Ry. Company* v. *Muscoda Local No. 123*, 321 U.S. 590.

II. THE DECISION OF THE COURT BELOW IN THE INSTANT CASE CONFLICTS WITH PERTINENT DECISIONS OF CIRCUIT COURTS OF APPEAL.

The decision and reasoning of the 8th Circuit Court of Appeals in the case of *Glenn L. Martin Nebraska Company* v. *Culkin* (1952) 197 F.(2d) 981, cert. den., 344 U.S. 866, is in conflict with the decision of the Court of Claims in the present case. The trend of reasoning in that case is indicated in the following excerpt from its opinion: "Much emphasis is placed by defendant upon the fact that only in comparatively few instances did the evidence show that guards or firemen were required to answer calls for fires or to quell disturbances during the 30 minute period in question. But the question was not so much whether the guards and firemen were actually regularly called upon to put down overt acts of violence, sabotage, disturbances, or to put out fires during the 30 minute period, is it was whether they were performing their regular duties during that period and were then substantially performing the duties assigned to them by their employer *and were not free to follow pursuits of a purely private nature*". (Italics supplied).

It is respectfully submitted that the decision in the case at bar is likewise in conflict with the applicable principles enunciated in the cases of *Beall* v. *U. S.*, 182

F.(2d) 565 (C.C.A. 6, 1950), cert. den., 340 U.S. 852, and *Mitchel* v. *Greinetz* (C.C.A. 10, 1956), 235 F.(2d) 621.

III. THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

(a) The case at bar is one of a large number of cases now pending in the Court of Claims, in which groups of employees, such as the petitioners here, claim pay for time on duty or work performed by them, or both, in excess of 40 hours per week. Among such cases are:

William Ahearn, et al. v. *United States*, No. 332-55 (Naval Station at Newport, Rhode Island)
Merlin Armstrong, et al. v. *United States*, No. 145-56 (Air Force Base in Oklahoma)
Charles A. Andrews, et al. v. *United States*, No. 481-55 (Naval Station, Norfolk, Virginia)
Amando Acevedo, et al. v. *United States*, No. 258-56 (Naval Station at Key West, Florida)
Ray W. Booker, et al. v. *United States*, No. 14-57 (Veterans Administration, Roanoke, Virginia)
Joseph H. Bell, et al. v. *United States*, No. 289-57 (Military Academy, West Point, N.Y.)
Harold Eugene Beanblossom, et al. v. *United States*, No. 175-57 (Veterans Administration, Long Beach, California)
Albert M. Boatman, et al. v. *United States*, No. 382-57 (Naval Station, China Lake, California)

The decision in all of the foregoing cases hinges upon the proper application of Sections 201 and 301 of the Federal Employees Pay Act of 1945.

(b) The present case is one of a series decided by the Court of Claims which are so inconsistent with each other as to leave the law in a serious state of confusion.

In the month of January, 1955, and prior to the trial of the case at bar, the Court of Claims rendered an opinion in the case of *Cora C. Farley* v. *United States*,

131 Ct. Cl. 776. The *Farley* case was followed by the case of *England, et al.* v. *United States,* 133 Ct. Cl. 768. Invoking the decision of this Court in *Skidmore* v. *Swift and Company,* 323 U.S. 134, the Court of Claims decided that the claimants were entitled to overtime compensation and to night pay differential for 43 hours average by-weekly time during which they necessarily remained in charge of a cottage in a federal reformatory, as correctional officers. The Farley decision was reached even though the evidence showed that at 9:30 P.M., being the beginning of this extra period, the lights in the cottage went out, the doors locked, and claimant expressly permitted to go to sleep in a private room used by her exclusively, and not required to engage in active duty except on rare occasions. Throughout the opinion rendered in the *Farley* case the Court alludes to the element of *duty* to remain on the defendant's premises, rather than to the frequency and degree of service actually rendered, as determinative of the decision that the extra hours thus spent by her were "hours of employment" within the meaning of section 201 of the Pay Act of 1945. After referring to some pertinent findings, the Court stated: "In these circumstances, we cannot escape the conclusion that the correctional officer was on *duty.* The order itself stipulated that the officer should 'remain on *duty*'. Her freedom of choice to follow her own habits was restricted for the benefit of the defendant . . ." (Italics supplied). The *England* case followed closely the reasoning of the *Farley* case.

The trial commissioner of the Court of Claims, to whom the instant case was referred with directions to make findings of fact and to make recommendations as to the legal conclusions, expressed the view (R. 24) that the case at bar is identical, in legal principle, with the *Farley* case, in effect urging that the Court of Claims repudiate its earlier decision in the *Farley* case.

However, in the *Per Curiam* opinion filed in the present case, the Court of Claims rests its decision on the authority of the case of *Harold Gaetke, et al.* v. *United States* (decided November 7, 1956), Appendix p. 18, and proceeds to state that, "on the authority of our opinion in the Gaetke case . . . we adopt and approve the trial commissioner's findings of fact and the conclusion of law which he has recommended. The petitions are dismissed". To "adopt" and "approve" findings of *fact* on the authority of any *opinion* previously rendered in connection with another case with which petitioners in the case at bar had no connection entailed departure from proper procedure necessarily leading to unsound reasoning and erroneous decision.

Several formal aspects of the *Gaetke* case clearly distinguish it from the case at bar. Gaetke's claim arose under the 1934 Pay Act which prescribed overtime payments for hours of "labor" (Italics by the Court in its opinion in the *Gaetke* case), in contrast to the 1945 Pay Act which provides for overtime payment for excess hours of *employment*. The 1945 Pay Act, being the first comprehensive federal legislation on the subject, it must be presumed that the change of terminology was deliberate on the part of Congress, and intended to substitute a more elastic conception for one which is of a more restricted nature. Gaetke was a Wage Board employee, whereas petitioners herein are General Schedule employees in the classified service. It is reasonable to argue for a less rigid interpretation of the term employment as applied to the former than would be the case with the latter.*

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* Distinctions between these groups of employees as regards overtime compensation, and for other purposes, are evident in the following laws: The Lloyd-LaFollette Act of August 24, 1912, 57 Stat. 714, Chapter 508, Section 4(b) 5 U.S.C., Section 189(a); 43 Stat. 1300, Chapter 549, Section 1, 44 U.S.C., Section 75.

Furthermore, Gaetke chose to restrict his potential rights by a *contract* with the Alaska Railroad. Such contract, of course, would normally be conclusive of his rights unless, to quote from the opinion of the Court of Claims in the case of *Farley* v. *United States, supra,* such contract was contrary to a "clear statute". In the Gaetke case the Court of Claims in effect decided that the contract was binding because the statute governing that case confers a right to overtime payments only for *labor,* and Gaetke failed to allege that he performed any labor in excess of 40 hours per week. In the case at bar no contract is involved.

But, the reliance of the Court below upon the Gaetke case as a basis for adopting and approving *findings of fact* points to an extraordinary departure from the usual judicial method in that (a) it shows that in fashioning its findings of fact the Court of Claims was guided and motivated by a preconceived notion of the legal conclusion which it considered appropriate to the case, and (b) the decision dismissing the petition evidences a disregard by the Court of Claims of the factual aspect of its own Findings, apparently, on the theory that such facts are not legally relevant. As pointed out in the Statement of the Case, *supra,* pp. 4-5, petitioners herein clearly performed *some* services, and that they did *some* work during their so-called sleeping and eating periods. By contrast, the Court of Claims in its opinion in the *Gaetke* case, Appendix, p. 20, specifically states: "The petition does not allege that these employees put in more than 56 hours a week of labor and standby time for which they were paid . . ." Again, Appendix, at page 20, "since it is not alleged that plaintiffs were deprived of the requisite number of hours for sleeping and eating . . . the 1934 Act has been complied with."

Also, by contrast with the case at bar in which the findings show the unsatisfactory character of the sur-

roundings in which petitioners spent their rest period and the tenuous quality of their sleep no similar evidence is discernible in the Gaetke case.

In the face of these dissimilarities it is difficult to perceive in what way the Gaetke case is related to the case at bar, unless the existing facts were to be treated as utterly insignificant. An attitude like this was specifically repudiated by this Court in the following language used by it in the case of *Skidmore* v. *Swift and Company*, 323 U.S. 134, 140. Speaking of the action of the U. S. District Court in that case, this Court stated: "Its evaluation and inquiry were apparently restricted by the notion that waiting time may not be work, an understanding of the law which we held to be erroneous".

CONCLUSION

For the foregoing reasons, petitioners pray that the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

(Decided April 3, 1957)

No. 209-55

WILLIE C. SAWYER, ET AL. v. THE UNITED STATES

No. 210-56

CHARLES E. BURGESS, ET AL. v. THE UNITED STATES

Mr. Irving Wilner for the plaintiffs. *Messrs. Keith L. Seegmiller* and *William J. Houston* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant, *Mr. Thomas J. Lydon* was on the brief.

OPINION

PER CURIAM: This case [1] was referred by the court, pursuant to Rule 45 (c), to C. Murray Bernhardt, a trial commissioner of the court, with directions to make findings of fact, and to make recommendations as to the legal conclusions which the court should reach as a result of

[1] After evidence was closed in the *Sawyer* case, the parties in the *Burgess* case filed a stipulation consolidating the two for trial, since both involved identical facts and common issues of liability. The commissioner ordered the consolidation pursuant to Rule 28 (a) and the cases are reported jointly. At trial the issue of liability was separated from that of damages.

the findings and applicable statutes and legal principles. The report of the commissioner was made before the court's decision in the case of *Harold Gaetke, et al.*, v. *The United States* (decided November 7, 1956).

On the authority of our opinion in the *Gaetke* case, *supra*, we adopt and approve the trial commissioner's findings of fact and the conclusion of law which he has recommended.

The petitions are dismissed.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 334-54

(Decided November 7, 1956)

HAROLD GAETKE, ET AL., v. THE UNITED STATES

Mr. Ray R. Murdock for plaintiffs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General George Cochran Doub,* for defendant. *Miss Cecilia S. Kraeling* was on the brief.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

WHITAKER, *Judge,* delivered the opinion of the court:

Plaintiffs were fire fighters employed by the Alaska Railroad under a contract that required their presence at the fire house every other day for the full 24 hours. The contract provided:

> • • • The first sixty (60) hours on the job, less twenty (20) hours for sleeping and eating, will be regarded as the basic 40-hour work week. • • •
>
> The entire period of twenty-four (24) hours on duty, less time allowed for sleep and meals will be used in computing the total number of regularly scheduled hours per week for overtime pay purposes. Two-thirds (2/3) of each hour on the job will represent time in pay status and one-third (1/3) as time out for sleeping and eating. During the twenty-four (24) hours on duty, employees are required to remain at the fire station and respond immediately to emergencies, day or night. During off duty period, employees are not required to remain in the fire hall.

Plaintiffs have been paid for 40 hours a week regular time and for 16 hours overtime. They claim they are

entitled to pay for 44 hours overtime and 40 hours regular time. They are not entitled to this under the contract, but they say they are entitled to it under section 23 of the Act of March 28, 1934 (48 Stat. 522) and under the Federal Employees Pay Act of 1945 (59 Stat. 296). The pertinent part of section 23 of the 1934 Act is the proviso, which reads as follows:

> * * * *Provided*, That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one-half.

The same provision is contained in the 1945 Act.

Plaintiffs say that where the pay of an office or position is fixed by statute, a government employee is entitled to this pay notwithstanding his agreement to receive a lesser pay. They then say that they were on duty every other day for 24 hours a day, and that, under the statute, they are entitled to compensation for the full 24 hours.

It is agreed that plaintiffs were subject to call at any time during the 24 hours, but it is admitted that they rarely, if ever, actually worked 24 hours in any one day. Ordinarily, during the 24 hours, they labored 8 hours; for another 8 hours they were in a stand-by status, during which they were required to do no labor, but were free to play cards, dominoes, listen to the radio, or do anything they pleased, so long as they stood ready to respond if they were called upon. For these 16 hours they were paid; for a part they were paid straight time, and for the rest, time and a half.

They were not paid for the other 8 hours, because this was supposed to be devoted to sleeping and eating. Under the contract the first 60 hours of a week were supposed to represent the basic 40-hour week, 20 hours being regarded as time devoted to sleeping and eating. If more than 60 hours were required of the employee, two-thirds of it were compensable at time and a half, and one-third was supposed to be spent in eating and

sleeping. Actually, as stated, 56 hours a week of labor and stand-by time was demanded, and they were compensated accordingly.

The petition does not allege that these employees put in more than 56 hours a week of labor and stand-by time, for which they were paid, if the time spent in eating and sleeping is not to be counted as stand-by time. It does not allege that 28 hours a week, for which they claim additional compensation, were not available to them for eating and sleeping. If they were, it is difficult to see how they can claim compensation therefor. An employer does not have to pay an employee for the time he spends in bed or at the dining table.

It may be that after the employee went to bed he was called to fight a fire, but if other time during the week was made available to him for sleeping and eating, so that during the week a total of 28 hours were so available, we are unable to see how the employee had spent more than 56 hours during the week at labor and in a compensable stand-by status. All that the Act requires is that an employee be paid regular time for 40 hours a week, and that he shall be paid time and a half for hours *of labor* in excess of 40 hours. Time spent in eating and sleeping are not spent in labor. Since it is not alleged that plaintiffs were deprived of the requisite number of hours for sleeping and eating, and since it appears that they have been paid for all time spent except in eating and sleeping, it seems to us that the 1934 Act has been complied with.

The contract between the employees and the railroad was a sensible and realistic application of the statute to the peculiar requirements of plaintiffs' jobs.

The Fair Labor Standards Act (52 Stat. 1060), applicable to private industry engaged in interstate commerce, provided for a workweek of 40 hours at regular pay, and time and a half for overtime. Swift & Company employed fire-fighters for the protection of their

plant. From three and one-half to four nights a week they were required to remain at the fire hall after their hours of labor were over. They claimed overtime therefor. The Supreme Court, in its opinion reported in *Skidmore* v. *Swift & Co.*, 323 U. S. 134, did not decide whether they were entitled to be paid for sleeping and eating time, but at page 139 it did refer to the brief *amicus curiae* of the Administrator of the Fair Labor Standards Act as follows:

> The facts of this case do not fall within any of the specific examples given, but the conclusion of the Administrator, as expressed in the brief amicus curiae, is that the general tests which he has suggested point to the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time: although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely interrupted in their normal sleeping and eating time, and these are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances; the rest of the time is different because there is nothing in the record to suggest that, even though pleasurably spent, it was spent in the ways the men would have chosen had they been free to do so.

Of this statement of the Administrator the court said:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

In *Winsberg* v. *United States*, 120 C. Cls. 511, we held that a physican employed by the Veterans Administration was not entitled to compensation for the time spent in eating and sleeping, although he was subject to call during those hours. This case arose under the War Overtime Pay Act of 1943 (57 Stat. 75), which provided for a workweek of 40 hours and for time and a half for overtime.

See also *Bowers, et al.* v. *Remington Rand*, 159 F. 2d 114, and *Bell* v. *Porter*, 159 F. 2d 117.

The facts in *Farley* v. *United States*, 131 C. Cls. 776, and *England, et al.* v. *United States*, 133 C. Cls. 768, differ materially from the facts in the case at bar. In those cases plaintiffs regularly performed substantial labor during their sleeping time. In the case at bar it is not alleged that any labor was actually performed during the eight hours allowed for sleeping and eating.

It results that defendant's motion for summary judgment is granted, and plaintiffs' petition is dismised.

It is so ordered.

LARAMORE, *Judge*; MADDEN, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 420

WILLIE C. SAWYER, ET AL., AND CHARLES E. BURGESS, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 16–17) is not yet reported. The findings of fact and the conclusions of law adopted by the Court of Claims from the report of its Commissioner are printed in the Appendix, *infra*, pp. 13–26.

JURISDICTION

Final judgment in the Court of Claims was entered on April 3, 1957 (R. 59). A motion for rehearing was denied on June 5, 1957 (R. 65). The petition for a writ of certiorari was filed on September 3, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether guard-firefighters who sleep and eat at a Veterans Hospital during twelve and twenty-four hour tours are entitled to compensation under the Federal Employees Pay Act of 1945 for the time they spend in bed or at the dining table during these tours.

STATUTES INVOLVED

The pertinent portions of the Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, provide:

> SEC. 201. Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative workweek, at overtime rates as follows: * * *. [5 U. S. C. 911.]
>
> * * * * *
>
> SEC. 301. Any officer or employee to whom this title applies who is assigned to a regularly scheduled tour of duty, any part of which, including overtime, falls between the hours of 6 o'clock postmeridian and 6 o'clock antemeridian, shall, for duty between such hours, excluding periods when he is in a leave status, be paid compensation at a rate 10 per centum in excess of his rate of basic compensation for duty between other hours: * * *. [5 U. S. C. 921.]
>
> * * * * *
>
> SEC. 604. (a) It shall be the duty of the heads of the several departments and independent establishments and agencies in the executive branch * * * to establish as of the effective date of this Act, for all full-time officers and

employees in their respective organizations, in the departmental and the field services, a basic administrative workweek of forty hours, and to require that the hours of work in such workweek be performed within a period of not more than six of any seven consecutive days. [5 U. S. C. 944.]

* * * * *

SEC. 605. The Civil Service Commission is hereby authorized to issue such regulations, subject to the approval of the President, as may be necessary for the administration of the foregoing provisions of this Act insofar as this Act affects officers and employees in or under the executive branch of the Government. [5 U. S. C. 945.]

* * * * *

STATEMENT

Petitioners are employed by the Veterans Administration as guard-firefighters in the Oteen Veterans Hospital in North Carolina. Under Veterans Administration rules, their administrative workweek totals sixty hours divided into two duty tours of twenty-four hours and one tour of twelve hours. The twenty-four-hour tour is broken down into a period for performing routine assignments, an inactive standby period, three meal periods, and a sleeping period between midnight and eight A. M. The twelve-hour tour is similarly divided into work, standby, meal, and sleeping periods.

Salary payments are computed on the basis of all time spent on duty, less periods set aside for meals and sleep. One-third of the total time on duty is

allocated to eating and sleeping. To simplify administration of leave and pay records, payment is calculated on the basis of the 60-hour workweek but each hour on duty is credited for pay, leave, overtime, and night differential purposes, as ⅔ of an hour. In this way, it is unnecessary to calculate the particular hours each guard-firefighter is allowed for the taking of meals and for rest. The time set aside for rest and refreshment is automatically calculated and deducted, and each guard-firefighter is paid a basic salary equivalent to 40 hours straight time.

Petitioners filed these suits in the Court of Claims to recover overtime and night differential pay for the periods in the administrative workweek allocated for food and sleep. A Commissioner of the Court of Claims found after trial that (App., *infra*, p. 25):

> 17. Plaintiffs were paid for a 40-hour week and received no overtime pay or compensatory time off for performance of duty or time compulsorily spent on the reservations in excess of 40 hours weekly. They received night differential pay computed under the two-thirds rule, that is, for two-thirds of each hour of duty between 6 P. M. and 6 A. M. they were paid the 10-percent addition provided for under section 301 of the Federal Employees Pay Act of 1945. Similarly, for each period of sick or annual leave, they were charged on the same two-thirds basis.

The Commissioner concluded that the petitioners were not entitled to recover.

The Court of Claims adopted the findings of fact and conclusion of law recommended by its Commis-

sioner on the authority of its decision in *Harold Gaetke, et al.* v. *United States,* 145 F. Supp. 913, decided November 7, 1956, Pet. App. 18–22, which involved a similar claim. The petitions were dismissed (Pet. App. 16–17).

ARGUMENT

1. Congress has not authorized payment to employees who eat and sleep on Government reservations during tours of duty as guards and firemen. The Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, *supra,* pp. 2–3, authorizes compensation in addition to regular salary "for all *hours of employment,* officially ordered or approved, in excess of forty hours in any administrative workweek * * *". 5 U. S. C. 911, 59 Stat. 296 (emphasis added). Hours spent eating and sleeping are plainly not "hours of employment," for as the Court of Claims has pointed out in an almost identical suit for overtime: "An employer does not have to pay an employee for the time he spends in bed or at the dining table." *Harold Gaetke* v. *United States,* 145 F. Supp. 913, 914, Pet. App. 18–22. In *Gaetke,* the Court of Claims denied a demand by firemen for sleep and meal pay under a statute providing that "the regular hours of labor shall not be more than forty per week; * * *" (Sec. 3, Act of March 28, 1934, 48 Stat. 522, incorporated by Sec. 203, Federal Employees Pay Act of 1945, 59 Stat. 296).

Congress has used various phrases to define the workweek, but none of them authorizes pay for eating and sleeping. Thus, "hours of employment" describes

compensable time for classified employees in the Federal Employees Pay Act. For unclassified wage-board workers, the phrase is "hours of labor" (see *Gaetke* v. *United States, supra*). In a 1942 pay act (56 Stat. 1068), a special premium in lieu of overtime was added to the pay of employees whose "hours of duty" were intermittent. All of these phrases have the same meaning. They are used, as was said of the 1942 pay act, "in the sense of time or hours devoted to actual work, rather than in the sense of tours of duty of certain employees during portions of which tours of duty they are not engaged in actual work." *Conn* v. *United States,* 107 Ct. Cls. 422, 458, 68 F. Supp. 966, 971, certiorari denied, 332 U. S. 757. A fireman's time spent standing by on a tour of duty may be properly treated as actual work; time spent eating and sleeping is not.[1]

[1] This is also the understanding which the Senate Committee on Post Office and Civil Service has of the Federal Employees Pay Act. In recommending a proposed amendment to that Act, the Committee said (S. Rep. No. 687, 85th Cong., 1st Sess. p. 2):

"The equity of the bill lies in the fact that under its terms each fire fighter or other "long-tour standby" employee would be paid for unscheduled and irregular overtime beyond his established tour on exactly the same basis as other Federal employees. In that respect the committee desires to make clear that overtime would not be paid for time allowed for eating and sleeping during overtime assignments. This is consistent with the provisions of the Federal Employees Pay Act under which standby employees paid under the regular hourly premium pay provisions are not paid for uninterrupted periods allowed for sleeping and eating and the Fair Labor Standards Act which does not require that standby employees in industry be paid for such periods.

2. Petitioners insist that this principle is inconsistent with language of the Court in *Armour & Co.* v. *Wantock,* 323 U. S. 126, and *Skidmore* v. *Swift and Co.,* 323 U. S. 134. In so arguing they ignore this Court's admonition in *Armour* "that words of our opinions are to be read in the light of the facts of the case under discussion." 323 U. S. 126, 132–133. In that case, firemen who were required to stand 24-hour tours sued for overtime and liquidated damages under the Fair Labor Standards Act, contending that *all* time on their employer's premises was compensable. The District Court "declined to go to either extreme demanded by the parties as to working time. Usual hours for sleep and for eating it ruled would not be counted, but the remaining hours should." 323 U. S. at 128–129. The firemen did not appeal from this ruling; but their employer did. This Court affirmed in the employer's case.

In *Skidmore* v. *Swift & Co., supra,* the District Court considered a similar claim but concluded that time spent standing-by in idleness was not compensable. It made no attempt to distinguish sleep and meal periods from other time-on-call. This Court reversed, holding that the District Court should have weighed the particular facts in the light of the general tests set down by the Administrator of the Wage and Hour Division in the Department of Labor. These tests "point to the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time * * *." 323 U. S. 134, 139. It is precisely this test which the Court of Claims applied in the instant suit. Far from being

inconsistent with *Armour* and *Skidmore*, its decision denying pay for sleeping and eating is a clear application of the principles of those decisions.

3. Petitioners also claim (Pet. 10–11) to find a conflict between the decision below and opinions of the Courts of Appeals interpreting the Fair Labor Standards Act. *Glenn L. Martin Nebraska Co.* v. *Culkin*, 197 F. 2d 981 (C. A. 8), certiorari denied, 344 U. S. 866; *Mitchell* v. *Greinetz*, 235 F. 2d 621 (C. A. 10). In both cases, as in this case, the principles of *Armour* and *Skidmore* were applied, but the evidence led to a different factual conclusion. "Each case must stand on its own facts." *Skidmore* v. *Swift & Co.*, 323 U. S. at 140.

In *Greinetz*, piecework employees were compelled to take 15-minute rest periods because their employer had discovered that this improved their efficiency. The rest periods were an essential part of the employees' job and thus were compensable under the same principle as petitioners' standby time apart from meal and sleeping hours. The *Glenn L. Martin* case involved an attack by an employer on a finding of fact by the District Court that during a half-hour lunch period, included in the 8½ hour shift of guards and firemen, "the employees were engaged in the principal activity of the workweek * * *" The Court of Appeals for the Eighth Circuit affirmed the District Court's award of overtime pay, holding that the finding was amply supported by the evidence. While the case may appear somewhat inconsistent in approach with the instant case, there are several significant differences. First, the issue before the Court of Appeals

was whether there was sufficient evidence to support the District Court's finding of fact. The affirmative resolution of this narrow issue does not constitute a holding that all guards and firemen in all circumstances must be paid for eating lunch. Second, prior to the establishment of their half-hour lunch period, the guards and firemen had been paid for meals as a matter of custom (they had been allowed to eat on duty during eight-hour shifts); their working hours were extended to include the lunch period after their employer forbade eating on duty. Finally, prior to the litigation, the employer resumed the custom of paying for meals by compensating the guards for the lunch hour; the suit was concerned only with the employees' right, in the circumstances, to have this practice applied retroactively under the Fair Labor Standards Act.

Nor is *Beal* v. *United States,* 182 F. 2d 565 (C. A. 6), certiorari denied, 340 U. S. 852, inconsistent with the result here. The Court of Appeals for the Sixth Circuit held that fire fighters employed by the Government who stood 24-hour watches stated a cause of action in their suit for overtime where their complaint showed that they were on duty 56 hours a week after deducting time for sleep and meals. The case was remanded for further proceedings in the light of regulations issued after *Skidmore,* which authorized pay for standby time but excluded sleep and meal periods. This accords with the action taken by the Court of Claims in this case.

3. Petitioners also urge this Court to consider their claims for rest and refreshment pay because, in their

view, contradictory decisions of the Court of Claims have confused the law governing the compensation of long-tour employees. This confusion, we submit, does not exist. The Court of Claims has consistently recognized the principle of *Skidmore* v. *Swift & Co.*, *supra*, that the particular facts in one class of overtime cases may require a result entirely different from another class of cases under the same law. This can readily be seen by comparing the instant case with cases involving female correctional officers. *Farley* v. *United States*, 131 Ct. Cls. 776; *England* v. *United States*, 133 Ct. Cls. 768. In the latter two cases, women charged with the health, safety, and security of inmates at the Federal Reformatory for Women were required to spend three nights a week confined among their charges. Their duties required them to attend during the night to the disciplinary, medical, and emotional needs of fifteen to thirty convicted women, some of whom had babies born in the Reformatory. The Court of Claims had no difficulty in distinguishing such arduous duties from the comparative calm of a firehouse dormitory.

4. Finally, petitioners demand that this Court review their pay claim because the court below found that sleeping conditions in the firehouse were not as comfortable as those at home (Pet. 9). Very few places are, but the legal issue does not turn on such minor inconvenience. And there is nothing in the Court of Claims' findings indicating any substantial difference between their quarters at Oteen and the

facilities contemplated by the Adminstrator's tests in *Skidmore*.[2]

CONCLUSION

For the foregoing reasons, it is respectfully submitted the petition for certiorari should be denied.

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Solicitor General.

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SAMUEL D. SLADE,
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OCTOBER 1957.

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[2] Equally unmeritorious is petitioners' argument that the Court of Claims erred in denying their motion for rehearing on the factual question of whether they were working a minimum of 41½ hours on routine assignments, apart from eating and sleeping periods, (Pet. 8–9). The court adopted its Commissioner's finding (fn. 5 to finding 13, *infra*, p. 23) that: "both parties seem content to state a weekly average of 20 hours for eating and sleeping, even though this figure involves a fluctuating margin of error." And the Court of Claims held on the basic issue that petitioners did not in fact work in excess of 40 hours per week. Petitioners were not entitled, after a full trial on this issue, to relitigate the matter.

APPENDIX

In the United States Court of Claims

(Decided April 3, 1957)

No. 209–55

WILLIE C. SAWYER, ET AL. v. THE UNITED STATES

No. 210–56

CHARLES E. BURGESS, ET AL. v. THE UNITED STATES

Mr. Irving Wilner for the plaintiffs. *Messrs. Keith L. Seegmiller* and *William J. Houston* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant. *Mr. Thomas J. Lydon* was on the brief.

OPINION

PER CURIAM: This case[1] was referred by the court, pursuant to Rule 45 (c), to C. Murray Bernhardt, a trial commissioner of the court, with directions to make findings of fact, and to make recommendations as to the legal conclusions which the court should reach as a result of the findings and applicable statutes and legal principles. The report of the commissioner was made before the court's decision in the case of *Harold Gaetke, et al.*, v. *The United States* (decided November 7, 1956).

On the authority of our opinion in the *Gaetke* case, *supra*, we adopt and approve the trial commissioner's findings of

[1] After evidence was closed in the *Sawyer* case, the parties in the *Burgess* case filed a stipulation consolidating the two for trial, since both involved identical facts and common issues of liability. The commissioner ordered the consolidation pursuant to Rule 28 (a) and the cases are reported jointly. At trial the issue of liability was separated from that of damages.

fact and the conclusion of law which he has recommended. The petitions are dismissed.

FINDINGS OF FACT

1. The plaintiffs are citizens of the United States and residents of North Carolina.

2. For various periods since May 25, 1949, the plaintiffs have been employed by the defendant in the combined capacity of guards-firefighters at the Oteen Veterans Hospital, a facility of the Veterans Administration.

3. The plaintiffs seek to recover overtime compensation for the respective periods of their employments within the six-year period prior to the commencement of their suits, pursuant to the provisions of section 201 of the Federal Employees Pay Act of 1945 (59 Stat. 295), as amended, and extra night pay differential pursuant to the provisions of section 301 of that statute. The *Sawyer* petition was filed May 25, 1955. The *Burgess* petition was filed May 15, 1956.

4. The Oteen Veterans Hospital is located at Oteen in the State of North Carolina. A division of this facility known as the Oteen Hospital, Swannanoa Division, is located at Swannanoa, six miles east of Oteen. Both hospitals are under the joint administration of a manager. There exists in the Office of the Manager an Engineering Division, headed by a chief in charge of engineering maintenance and operation of both hospitals. Within the Engineering Division there are two protective sections solely concerned with guard duties and fire protection, each headed by a protective section chief, one section for Oteen and one for Swannanoa.

5. a. The Oteen Hospital proper comprises an area of approximately 160 acres, 80 acres of which are enclosed by a cyclone link fence 6 feet high and about 2¼ miles in length. Within this enclosure are the hospital quarters consisting of 62 permanent, semifireproof buildings. There are two pedestrian and two traffic gates through which persons and goods enter or leave this enclosed area. Doctors' and nurses' quarters, a reservoir, and various service facilities are located on the hospital grounds outside the fence.

b. The Oteen Hospital is a self-contained and substantially integrated institution maintaining its own repair and service

facilities, such as a garage for 30 vehicles and machine shop, plumbing, radio, paint, and carpentry shops, storage yards and buildings, cafeteria, laundry, and flower nursery. It serves the medical needs of 700 to 800 tuberculosis and lung patients at all times. Seven to eight hundred medical and other employees work there.

6. a. The Swannanoa Division of Oteen Veterans Hospital is devoted to the practice of general medicine. Prior to its acquisition by the Veterans Administration it was an Army medical facility known as the Moore General Hospital. It normally maintains 450 to 500 patients and a staff, medical and otherwise, of about 500 persons. Swannanoa Hospital consists of approximately 200 buildings of wood-frame and of nonfireproof construction. With the exception of two or three buildings which are two stories high, all the others are of the one-story type. The greater part of the grounds is fenced in. One pedestrian gate and one vehicular traffic gate provide ingress and egress to and from the enclosed area.

b. While neither division of the Oteen Hospital is designed for the care of psychiatric patients, mentally ill patients are cared for in these hospitals on a temporary or incidental basis.

7. a. Prior to 1947, the positions of guard and firefighter were separate ones at the Oteen Hospital. The guards worked an eight-hour day, with some rotation of shifts arranged by agreement between the guards, but the record does not disclose the number of eight-hour days worked each week. The firefighters, who had a higher pay scale than the guards, were on duty 60 to 72 hours a week, and were compensated under the so-called "two-thirds rule," that is, two-thirds of each on-duty hour was treated as an hour of work for pay purposes.

b. The Veterans Administration issued Circular No. 9, dated December 29, 1945, Section III of which contained revised regulations on the subject of compensatory time and overtime pay reading, in pertinent part, as follows:

> 1. The basic workweek of the V. A. is 40 hours a week for service rendered 8 hours a day, Monday through Friday. The administrative work week is 44 hours a week, with overtime pay based on service on Saturday. Service in excess of 40 hours a week but not exceeding 48

hours a week is compensable at regular overtime rates. Overtime pay will be paid for service rendered in excess of 48 hours a week, unless compensatory time is requested.

* * * *

7. Effective immediately, any civilian employee confined to quarters on or off the station, or required to be at his post of duty beyond his normal tour of duty, as to be available for emergency call, will be paid overtime pay or allowed compensatory time off for time thus spent, except for that time allowed for sleep and meals. Generally speaking, for instance, a nurse who is designated as a member of a surgical team will be confined to quarters for only about four hours, the remainder of the time being allotted for sleep and meals. Furthermore, if sleep and/or meals are interrupted by an emergency call, the employee will be paid overtime pay or allowed compensatory time for the actual emergency service rendered in addition to compensation for time confined to quarters awaiting call.

c. On April 19, 1947, the Veterans Administration issued Technical Bulletin TB5–33,[2] providing, in pertinent part, as follows:

1. *Purpose.* This technical bulletin is intended to provide for adequate fire protection at isolated stations remote from municipal fire departments.

2. *Policy.* a. It is the policy of the VA to have adequate fire fighting and protective utility personnel available for protection against fire at isolated stations at all times.

b. The Deputy Administrator, or the manager of the station subject to approval of the Deputy Administrator, will accordingly be responsible for determining whether or not the accessibility of the station to municipal fire fighting units, the construction of the buildings at the station, and similar factors warrant maintenance of a round-the-clock fire fighting force at the station. (Adequate fire protection cannot be furnished at any station remote from municipal fire departments on a single eight-hour shift basis.)

c. The tour of duty for VA fire fighting personnel will be 24 hours on duty followed by 24 hours off duty. This tour has been determined to be the most economical

[2] These VA regulations of December 29, 1945, and April 19, 1947, are not in the record as exhibits because counsel had not produced them. The commissioner obtained copies of them independently, took judicial notice of them, and reprints parts in finding 7 b. and c. in order to complete a sequence on the subject.

method of assuring full-time fire protection and is in accord with general practice. Exceptions to this policy will be made only upon approval of the appropriate Deputy Administrator, and in no case will be made at a sacrifice of the basic requirement for adequate protection of isolated stations at all times. The same tour of duty will be adopted for all fire fighting personnel at any one station.

3. *Procedure for Recording Time Under the So-Called Two-Thirds Rule, 24 Hours On, 24 Hours Off.* The establishment of a tour of duty of 24 hours on and 24 hours off is referred to as the two-thirds rule. Under the two-thirds rule, the first 60 hours on duty during the week, less one-third or 20 hours for sleeping and eating, is regarded as the basic work week, and salary payment will be made on the basis of 40 hours straight time. Salary payment for overtime (in excess of the 60-hour tour of duty) will be made on the basis of two-thirds of each hour of service. Additional service rendered beyond the 60 hours of the tour of duty is required as the regular tour of duty. It will not be considered irregular or occasional overtime duty, and compensatory time for such overtime is not authorized.

4. *Minimum Charge of Annual and Sick Leave.* – An employee absent from duty on annual or sick leave will be charged for a period equal to two-thirds of the actual time covered by the absence, provided the minimum charge for any absence will be one hour.

5. *Charge of Leave Without Pay and Night Differential.* Leave without pay is also computed on the two-thirds basis. A fire fighter who is absent one hour while on his tour of twenty-four hours is charged with two-thirds hours in a nonpay status. It also follows that two-thirds of the ten percent of the basic rate of compensation for that portion of the first 60 hours on the job falling between 6:00 p. m. and 6:00 a. m. should be paid as night differential.

Change 1 to TB5–33 was issued August 4, 1947, amending the last sentence of paragraph 5 to read:

> It also follows that two-thirds of the ten percent of the basic rate of compensation should be paid as night differential for all regularly scheduled hours of service performed between 6 p. m. and 6 a. m.

d. On July 3, 1947, the Richmond Office of the Veterans Administration issued a Technical Bulletin bearing the symbol "TB RV 11–24" applicable to all hospitals in the region under its supervision, reading in material part as follows:

1. The purpose of this technical bulletin is to standardize basic personnel requirements for fire fighter-guards at field stations.

2. Each of the following hospitals will establish combination fire fighter-guard positions, based on the sixty-hour work week (known as the two-thirds rule) referred to in TB5–33:

*Fayetteville, N. C.	Richmond, Va.
*Fort Howard, Md.	Roanoke, Va.
Oteen, N. C.	Swannanoa, N. C.
Perry Point, Md.	Martinsburg, W. Va.
*Huntington, W. Va.	Kecoughtan, Va.

*Stations with less than 350,000 square feet of floor area.

VA Hospital, Washington, D. C., has been left intact because of its close proximity to Washington Fire Department which provides adequate protection.

3. Under the general supervision of the Utility Officer the station Safety Engineer will exercise staff supervision in the execution of the program. Each station will establish the positions of Chief, fire fighter-guard, and two assistants, whose tours of duty will rotate on Saturdays, Sundays, and holidays.

4. The work week will be composed of two 24-hour and one 12-hour tours of duty, the latter to be at night.

a. The 24-hour tour of duty will be divided into three parts—8 hours awake in the fire house, 8 for sleeping and eating, and 8 for security and fire-fighting details. These may or may not be continuous. The 12-hour tour of duty will be similarly broken up.

b. The schedule of duty will require at least two employees on duty, one of whom will be awake, in the fire house at all times.

This consolidation of functions was carried out at Oteen in the ensuing two years. It was accompanied by a reduction in force but not by a corresponding increase in pay to the individual whose duties were enlarged.

8. a. On January 31, 1949, the Veterans Administration issued Technical Bulletin 5–100, which related specifically to firefighting personnel and read, in material part, as follows:

2. *Policy*

a. It is the policy of the VA to have adequate fire-fighting and protective utility personnel available for protection against fire at isolated stations at all times.

c. The administrative workweek for VA fire-fighting personnel will be a maximum of 60 hours. A workweek in excess of 60 hours may be made in cases of emergencies, but in no event shall the scheduling of fire-fighting personnel over 60 hours be a continuing process. The 60-hour tour of duty will be scheduled so that each employee is on duty two 24-hour tours and one 12-hour tour per administrative workweek.

d. The tour of duty for fire chiefs will consist of a 40-hour workweek schedule of 5 days, 8 hours per day, subject to call for emergencies beyond the regular tour of duty. In the absence of the fire chief, an assistant or acting chief will assume command, working a 60-hour administrative workweek in accordance with the two-thirds rule.

3. *Procedure for Recording Time Under the So-Called Two-Thirds Rule.* The establishment of two 24-hour tours and one 12-hour tour per administrative workweek for fire-fighting personnel is referred to as the two-thirds rule. Under this rule, the 60 hours on duty during the administrative workweek, less one-third or 20 hours for sleeping and eating, is regarded as the basic workweek and salary payment will be made on the basis of 40 hours straight time. Salary payment for overtime (in excess of the 60-hour tour of duty) will be made on the basis of two-thirds of each hour of service.

4. *Minimum charge of Annual and Sick Leave.* An employee absent from duty on annual or sick leave will be charged for a period equal to two-thirds of the actual time covered by the absence, provided the minimum charge for any absence will be 1 hour.

5. *Charge of leave Without Pay and Night Differential.* Leave without pay is also computed on the two-thirds basis. A fire fighter who is absent one hour while on his tour of 24 hours is charged with two-thirds hours in a nonpay status. It also follows that two-thirds of the 10 percent of the basic rate of compensation should be paid as night differential for all regularly scheduled hours of service performed between 6 p. m. and 6 a. m.

b. On August 26, 1949, the Veterans Administration amended its "Manual for Personnel Administration," originally issued August 18, 1948, to include the following pertinent provisions under the heading "Hours of Duty":

c. *Establishment of Workweeks.*

(1) *Fixing Length of Workweeks.* Section 604 (a) of the Federal Employees Pay Act of 1945 requires agencies to establish a basic workweek of 40 hours for all full-time employees, with the hours of work to cover

a period of not more than six of any seven consecutive calendar days. Pursuant to the passage of that act, the President, in a memorandum to the heads of the departments and agencies dated August 23, 1945, indicated that there be established, whenever practicable, a basic workweek of 40 hours to be spread out over the first 5 days of the administrative workweek, Monday through Friday, 8 hours of work per day. Any hours of work in excess of the 40 in a regularly scheduled administrative workweek should be scheduled whenever possible for the sixth day, Saturday.

(a) Subject to the provisions of subparagraphs (b) through (d) below, there has been established for all full-time employees of the VA, subject to the provisions of the Federal Employees Pay Acts of 1945 and 1946, an administrative workweek which shall coincide with the calendar week and include a basic workweek of five 8-hour days, Monday through Friday of each calendar week. Sunday and Saturday of each calendar week normally are non-workdays. The foregoing does not operate to change the tours of duty of "On-call" employees, such as fire fighters, established in accordance with subparagraph (4) below.

* * * * * *

(2) *Length of Administrative Workweek for "On-call" Employees.* For "on-call" employees, the administrative workweek includes regularly scheduled "stand-by" time, except that allowed for by regulation of the agency for sleep and meals. The time allowed for sleep and meals needs not be specifically identified as particular hours; instead, the regulation may provide for the allowance of a specific number of hours out of each 24 hours on the job (25 Comp. Gen. 161). For detailed information on determining whether time is "stand-by" time, see chapter H2, Federal Personnel Manual.

(3) *Tours of Duty for "On-call" Employees.* It is the policy of the VA to limit "on-call" tours of duty to fire-protection personnel as described in subparagraph (4) below. Certain other types of employees, such as electricians, guards, laboratory technicians, chauffeurs, and administrative officers of the day (at domiciliary centers), may be subject to call for emergency service but not confined to quarters and thus are free to follow their own pursuits. They will be considered on "stand-by" time only for the actual emergency service rendered outside of their 8 hours a day. Whenever possible, regularly scheduled 40-hour tours of duty should be established in lieu of "on-call" tours for other than fire-fighting personnel.

(4) *Tours of Duty for Fire-Protection Personnel.* Tours of duty for fire-protection personnel will be set as follows:

(a) *Fire Fighters.* The administrative workweek for VA fire-fighting personnel will be a maximum of 60 hours. A workweek in excess of 60 hours may be made in cases of emergencies, but in no event shall the scheduling of fire-fighting personnel over 60 hours be a continuing process. The 60-hour tour of duty will be scheduled so that each employee is on duty two 24-hour tours and one 12-hour tour per administrative workweek.

(b) *Fire Chiefs.* The tour of duty for fire chiefs will consist of a 40-hour workweek schedule of 5 days, 8 hours per day, subject to call for emergencies beyond the regular tour of duty. In the absence of the fire chief, an assistant or acting chief will assume command, working a 60-hour administrative workweek in accordance with the "two-thirds rule."

(c) *The "Two-thirds Rule."* The establishment of two 24-hour tours and one 12-hour tour per administrative workweek for fire-fighting personnel is referred to as the "two-thirds rule." Under this rule, the 60 hours on duty during the administrative workweek, less one-third or 20 hours for sleeping and eating, is regarded as the basic workweek, and salary payment will be made on the basis of 40 hours straight time. Salary payment for overtime (in excess of the 60-hour tour of duty) will be made on the basis of two-thirds of each hour of service.[3]

9. During the entire period covered by this claim each of the plaintiffs, except when on leave status, had tours of duty totaling 60 hours each week, consisting of two 24-hour tours and one 12-hour tour, the former being from 8 a. m. to the following 8 a. m. and the latter from 8 p. m. to the following 8 a. m.

10. a. The 24-hour duty tour for each of the plaintiffs at Oteen was composed of a period during which they performed their routine assignments, a standby period when they remained at the firehouse awaiting call, three meal periods, and a rest period. Normally there were three men at a time on the 24-hour tour of duty, and the daily service schedule was devised so as to rotate and equalize the duties among them.

[3] It will be noted that the material parts of Technical Bulletin 5-100 reprinted earlier in this finding, are incorporated in identical language in the foregoing excerpt from the VA Manual for Personnel Administration.

b. The principal routine assignments consisted of guard duty at the main gate, which was manned in shifts by the 24-hour men from 8 a. m. to midnight, and on number 2 gate also manned from about 6:55 a. m. to 5 p. m. in shifts, guard duty in the lobby of the Administration Building during two hospital visiting periods each afternoon and evening totaling about 4½ hours daily, and a foot patrol of the grounds from 9 p. m. to midnight by one man each evening on a rotation basis. After arising at 6 a. m. these men would dress, have breakfast, and briefly relieve the men on the 12-hour shifts who were on guard at the main gate and the number 2 gate to afford them time for breakfast before the end of the 12-hour tour at 8 a. m.

c. Each of the 24-hour men had various periods of standby duty at the fire station. This varied from 3½ to 5½ hours a shift, depending on the duty tour prescribed by the daily service schedule for each individual on a given day. While on standby duty at the fire station plaintiffs were available for call in the event of a fire or if a guard was needed for an emergency.

d. Each of the 24-hour men had three meals during his tour of duty, each meal lasting from 20 to 30 minutes. All meals were taken at the post cafeteria at times not officially prescribed but regulated by mutual arrangement among plaintiffs. They were charged an annual fee for their meals whether eaten or not, and were not allowed to go outside the grounds for their meals. Plaintiffs were available for call during their meal periods, but the evidence does not establish that interruptions were frequent.

e. Although no regulation designated any specific hours of the 24-hour tour of duty at Oteen as a rest period, the daily service schedule designated 12 midnight to 8 a. m. as the sleeping period for the 24-hour men, and the plaintiffs on that duty habitually used those hours for sleeping.[4] Sleeping facilities were provided on the second floor of the fire station. While resting plaintiffs were available for call in the event of fire or other emergency, but the record indicates

[4] The daily service schedules in evidence provided a termination hour of 8 a. m. for the rest period. However, the evidence showed that the men were required to arise at 6 a. m. for the purpose of dressing, having breakfast, and briefly relieving the 12-hour men so that the latter could have breakfast before ending their tour of duty at 8 a. m.

that the frequency of such interruption was not significant. The sleeping facilities at Oteen consisted of six cots in a dormitory on the second floor of the fire station. Sleeping conditions were not ideal but were tolerable. The bachelor officers at Oteen had quarters on the same floor of the fire station. There were some interferences with sound sleep, such as the noises made by the telephone in the dormitory, infrequent emergency calls to official duty, repairs and maintenance on vehicles in the firehouse and garage below, and arrival and departure of delivery trucks and early workers as early as 4 a. m., but on the whole these conditions were such that normal men would adjust to them readily. The resulting rest was of a quality inferior to that which one would normally enjoy at home. There was no evidence that the health of any of the plaintiffs was impaired as a result of inadequate rest at the fire station, although many of them testified that they had to recoup their lost sleep at home at the conclusion of their tours of duty.

11. The 12-hour tour of duty for each of the plaintiffs at Oteen was also composed of separate periods for their routine assignments, standby duty, mealtimes, and rest.

a. From their arrival on duty at 8 p. m. they were allowed to rest in the fire station until 11 p. m. At midnight they relieved the men assigned to 24-hour tours. Their period of rest was subject to the same conditions as those described in finding 10 e. as to the men on 24-hour tours.

b. The routine assignments for the men on the 12-hour tours, for the period from midnight to 8 a. m. were to stand watch at the main gates throughout the period and to patrol the grounds until 5 a. m. These assignments were rotated among the plaintiffs so as to equalize the load.

c. Prior to entering onto their assignments at midnight these men would be allowed time for a light meal. Prior to going off duty at 8 a. m. they would have breakfast on the post under the same conditions described in finding 10. d.

12. The duties of plaintiffs at Swannanoa were substantially similar to those at Oteen. The main gate was covered at Swannanoa by the 24-hour men, usually on 4-hour shifts, to 1 a. m. and by a 12-hour man thereafter during the night. There was a patrol of the grounds from 8 p. m. to 1 a. m. by the 24-hour men, and by a 12-hour man thereafter to 5 a. m.

During visiting hours at Swannanoa a 24-hour man was stationed at the information desk. The main differences between Oteen and Swannanoa with respect to plaintiffs' tours of duty was that, although hours for commencement and termination of the shifts were identical, at Swannanoa the 24-hour men were relieved at 1 a. m. by the 12-hour men instead of at midnight as at Oteen, and at Swannanoa the 24-hour men rested until about 7 a. m. instead of 6 a. m. as at Oteen, although this termination hour naturally varied with the individual. Sleeping after 7 was permissible but difficult because of morning activities and need for breakfast before 8. The sleeping facilities at both places were of comparable standards, except at Swannanoa the dormitory was on the ground floor of the fire station adjacent to the firefighting equipment and vehicle garage, and during portions of 1949 and 1950 a two-way public address system was hooked up near the dormitory and the nurse or aid on duty in the detention ward of the hospital would use the system to call plaintiffs periodically from 6 p. m. to 6 a. m. to check on their availability. Also at Swannanoa, if the telephone system broke down, a light would go on and a bell would ring in the dormitory.

13. At both Oteen and Swannanoa each plaintiff averaged weekly about 20 hours for sleeping and eating, independent of naps they may have taken during standby time at the fire station.[5]

14. a. It cannot be estimated what percentage of plaintiffs' time was occupied in discharging their functions as guards as opposed to their functions as firefighters at both Oteen and Swannanoa. Only a minor part of their weekly total of hours was spent in actually fighting fires or in training in firefighting techniques. Yet all of the time they were on guard duty the detection of fires was one of the most important security responsibilities which their guard duties entailed. It is reasonable to conclude, however, that the firefighting functions were substantially more passive than active as contrasted to the guard functions. Plaintiffs were required to wear uniforms throughout their tours of duty

[5] In their requested findings and briefs both parties seem content to state a weekly average of 20 hours for eating and sleeping, even though this figure involves a fluctuating margin of error.

except while sleeping. Their guard duties were diversified and comprised, *inter alia*, dealing with criminal activities (e. g., robbery, threats with deadly weapons, and illicit liquor traffic), giving information to visitors, directing and accompanying patients to the Registrar's Office and to the various buildings, directing tradesmen about the reservation, checking patients in and out upon passes issued to them, and endeavoring to prevent patients' leaving the grounds without official leave, checking property about to be carried or transported outside of the reservation and examining the written authorization for such removal, examination of employees' cars about to leave the grounds when circumstances indicated such examination to be appropriate, disposal of contraband in accordance with regulations, helping with intoxicated patients or employees, escorting mentally ill patients to detention wards, assisting medical personnel in the handling of unruly patients, patrolling the fence, making rounds throughout the buildings with a watchman's clock, carrying out roving inspection duty, enforcement of traffic and parking regulations and assisting in the execution of traffic safety measures, erection and removal of barriers, enforcement of regulations forbidding the bringing of intoxicating liquors or narcotics upon the hospital premises, raising and lowering the flag, turning the lights off and on, the reporting of improper activities of hospital personnel to the proper officials, apprehension and removal of trespassing dogs, cats, foxes, rabbits, and livestock, the checking of the doors leading to the bank, financial office and credit union, and the occasional driving of ambulances and the like. If any of the foregoing emergencies arose while plaintiffs were enjoying their rest periods, and the men on duty were inadequate to cope with the problem, or unavailable, the plaintiffs were then required to interrupt their rest to discharge the duties. It is not believed that these interruptions were frequent, but they occurred with sufficient frequency to make necessary the presence of plaintiffs to cope with them.

b. Their firefighting duties included, in addition to the actual fighting of fires and training in firefighting techniques as previously mentioned, the carrying out of fire-prevention measures, maintenance of firefighting apparatus and equipment in working condition, inspection of fire extinguishers,

hose, alarm boxes, and sprinklers at regular intervals, and housekeeping work in the fire station. They also were responsible for assisting in the fighting of fires in several small neighboring communities.

c. Due to personnel shortage and to the absence of men on annual or sick leave, there occurred a small measure of "doubling over" both at Oteen and Swannanoa. This practice took the form of the men on the long shift continuing active work after midnight if a man on the 12-hour shift was unable to report for duty, or for those on the short shift substituting for an absent member of a long shift crew during their rest period from 8 p. m. to midnight.

15. Plaintiffs were married and living with their families. Their duty schedules caused a departure from the routine of family life and social activities normal to persons whose occupations involved more regular hours. While on duty they were permitted to receive telephone calls only through the engineer's office, and could make outgoing calls only from a pay telephone which, at Swannanoa, was 200 yards from the fire station.

16. The duty schedules described in preceding findings were officially ordered and approved, and plaintiffs were restricted to the reservation during their tours of duty, subject to disciplinary action for unauthorized absences. At the expiration of their tours of duty plaintiffs could not leave until they were relieved. If they were authorized to leave the post during the sleeping period, the time was charged against their annual leave under the two-thirds rule. On rare occasions they would have to attend Disciplinary Board hearings to testify during off-duty hours.

17. Plaintiffs were paid for a 40-hour week and received no overtime pay or compensatory time off for performance of duty or time compulsorily spent on the reservations in excess of 40 hours weekly. They received night differential pay computed under the two-thirds rule, that is, for two-thirds of each hour of duty between 6 p. m. and 6 a. m. they were paid the 10-percent addition provided for under section 301 of the Federal Employees Pay Act of 1945. Similarly, for each period of sick or annual leave, they were charged on the same two-thirds basis.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiffs are not entitled to recover, and their petitions are therefore dismissed.